

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

77-6078

To Be Argued By
Mark Lemle Amsterdam

77-6078
77-6081
77-6083

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

F. RAY MARSHALL, Secretary of Labor of the United States,
Plaintiff-Appellee,
-against-

GEORGE SNYDER, IRVING ROSENZWEIG, GENERAL TEAMSTERS
INDUSTRIAL EMPLOYEES LOCAL 806, 806 RECORD PROCESSORS, INC.,
ANTHONY CALAGNA, CLARENCE CLARKE, JOSEPH GRIPPO, JAMES
ISOLA, BENJAMIN PETCOVE AND WILLIAM SNYDER,

Defendant-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

REPLY BRIEF OF APPELLANTS GENERAL TEAMSTERS INDUSTRIAL
EMPLOYEES LOCAL 806 AND 806 RECORD PROCESSORS, INC.

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IN THE
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Docket Nos. 77/6078
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PROCESSORS, INC., ANTHONY CALAGNA,
CLARENCE CLARKE, JOSEPH GRIPPO,
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Defendant-Appellants.

REPLY BRIEF OF APPELLANTS GENERAL TEAMSTERS
INDUSTRIAL EMPLOYEES LOCAL 806 AND 806 RECORD
PROCESSORS, INC.

Defendants-Appellants General Teamsters Industrial Employees
Local 806 (hereinafter sometimes referred to as the "Union") and
806 Record Processors, Inc. (hereinafter referred to as "RPI")

submit this brief in reply to the Appellee's brief.

The reply to POINTS I and II of Appellee's brief which relate to the propriety of the District Court's Conclusions of Fact and of Law are treated separately in the Reply Brief of defendants-appellants Calagna, Clark et. al which Reply Brief and its arguments are specifically adopted and incorporated herein. The instant brief will address Appellee's POINTS III and IV.

POINT I

THE APPOINTMENT OF A RECEIVER WAS
NOT NECESSARY OR APPROPRIATE AND
CONSTITUTED AN ABUSE OF DISCRETION

By obfuscating the specific issue before the district court and by ignoring the relevance of substantial precedent, the appellee contends that there is both statutory authority and appropriate circumstances for the appointment of a receiver in the instant case. Appellee is incorrect in both contentions.

Appellee cites Mitchell v. DeMario Jewelry, 361 U.S. 288 (1959) with a quotation from Porter v. Warner Co., 328 U.S. 395, to the effect that the district court has inherent authority to appoint a receiver. Appellee fails to note the language in

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Porter that equitable powers may be restricted if there is an "inescapable inference" that certain powers are to be restricted 328 U.S. at 397-8. Such inference must be drawn in regard to the appointment of a receiver over an ongoing employee benefit plan. The federal courts are limited in their equitable powers in regard to labor disputes, 29 U.S.C. 101, 104, and these limitations cannot be circumvented by having a court-appointed official do what the court itself cannot.

Furthermore, carrying on and directly administering employee benefit plans for a lengthy period--in the absence of a contemplation of the plans' termination--is not the proper business of the federal judiciary. Cf. Marine Cooks & Stewards v. Panama Steamship Co., 362 U.S. 365 (1960); Wallace v. Kern, 499 F. 2d 1345 (2d Cir. 1974). The investment decisions, the policy considerations and the day to day contacts and dealings with the beneficiaries are best left to those with familiarity of the specific situation.* In the absence of express statutory authorization the federal courts should refrain from construing their authority too broadly. See, e.g., Moyer v. Kirkpatrick, 265 F. Supp. 348 (E.D. Pa. 1967).

*As an example of the problems posed by a court-appointed receiver, the receiver in the instant case has recommended that the plans sell some of their holdings of State of Israel bonds. Such decisions are clearly not the proper business of a United States District Court.

However, even if ERISA is construed so as to permit the use of receivers, the appointment in the instant case far exceeded the necessity for such drastic relief.

While the appellee cites Clark On Receivers, appellee fails to note the general rule on receivers as stated in Clark:

The appointment of such a receiver is regarded as one of the most difficult duties which a court of equity is called upon to perform. It is a peremptory measure the effect of which temporarily at least is to deprive of his property a defendant in possession before final judgment or decree. It is, therefore, not to be exercised doubtfully but the court must be convinced that the relief is needful. Since it is a serious interference with the rights of the citizens, it should only be granted for the prevention of manifest wrong and injury. And because it divests the owner of possession of his property before a final hearing, it is regarded as a severe and drastic remedy not to be adopted save in a clear case and never unless the complainant would otherwise be in danger of suffering irreparable loss.

Clark, supra §149
(emphasis added)

In the instant case, there is no irreparable loss to the complainant since any wrongful benefit to the Union can easily be rectified by the legal remedy of money damages. Leighton v. One William Street Fund, Inc., 343 F. 2d 565, 568, (2d Cir. 1965).

It must be borne in mind that the fundamental allegations of the complaint were not at issue before the district court at the time of the motion for appointment of a receiver. Thus, appellee's frequent references to the hypothecation or loan agreement, the building refurbishing and the payments to George Snyder are simply attempts to bury the real issue before the court; whether after the consent order had been entered, the alleged continuing violations warranted the drastic relief of receivership. These continuing violations involved the question of whether the consent order was being violated by indirect benefits to the Union.

In this regard, it was obvious that a serious dispute existed between the parties as to the meaning of the consent order. Defendants believed--and the district court has not found that this belief was not good faith--that the four individuals specified in the consent order could be paid for services rendered and there is no dispute that, in fact, services were rendered.* Appellee maintains that the above interpretation is strained and absurd and the clear meaning is that these four individuals could provide services only for RPI.

* Indeed, after making application to the district court, the receiver has rehired these four individuals.

In any event, the precise meaning of the consent order is not overly significant. All the district court had to do was clarify it--one way or the other. There was no indication that defendants would not comply with such clarified order, nor was there any other allegation of wrongdoing of such substantial and imminent dimensions as to require the drastic remedy utilized. If the district court intended that no services in addition to those rendered to RPI could be given by these individuals, a simple statement to that effect in a clarifying order would have sufficed.

The overly broad order resulted in part from a misconception of the "potential for conflict of interest or self-dealing" which appellee now recognizes is inherent in the statutory framework. (Appellee's brief, p. 25) It was this "potential" which the district court believed mandated a separation of the Union from its plans, a separation which, as appellants explored in their brief, is unwarranted and inappropriate under the terms of the statute. 29 U.S.C. 1108 (c)(3) Yet it was this precise statutory framework which was not explained to the district court or apparently, not considered in the Memorandum and Order now at bar.

The reasoning of Leighton, supra, which appellee attempts to distinguish, is obviously applicable on its face. Where

money damages will suffice, there is no reason to go further, especially at an interim stage of the proceedings. The cases appellants have previously cited are all applicable to this discussion and are even more compelling when applied to the instant facts. The cases regarding corporations have a potential danger to the claimants since if a corporation is bankrupt there may be no party who is ultimately liable to pay a money judgment, a problem not present at bar. Yet the standards applied in these cases strictly limit the availability of this drastic remedy. See, e.g., Wickes v. Belgian American Educational Foundation, Inc. 266 F. Supp. 38, 40 (S.D. N.Y. 1967) (to impose a receiver an 'emergency must exist'); Mintzer v. Arthur L. Wright Co., 263 F. 2d 823 (3rd Cir. 1959).

Thus, in light of the relatively insubstantial violations before the district court and the availability of other interim remedies as well as ultimate legal remedies, the Court below clearly abused its discretion in ordering / appointment of a receiver over the benefit plans.

The same arguments apply with even greater force to RPI since there were no allegations of wrongdoing against this

corporate defendant. RPI is not a sham corporation, but exists and functions as an independent corporation. It is not being used to "defeat an overriding public policy" (Bangor Punta Operations, Inc. v. Bangor & Aroostook R. Co., 417 U.S. 703 (1974)), nor "to defeat public convenience, justify wrong, protect fraud or defend crime." (Woodlawn Nursing Home Corp. v. Weinberger, 411 F. Supp. 501, 505 (S.D.N.Y., 1976)). In short, the corporate veil should not be pierced unless the corporation is a total sham and function. (Esquima Pie Corp. v. Whitelawn Dairies, 266 F. Supp. 79 (S.D.N.Y. 1967))

To permit a receiver over a party in interest is to open the floodgates of federal control over labor unions. Under the guise of alleged improper benefits in violation of ERISA, the government will seek to reestablish the control over labor organizations which control has been historically limited by the legislature. Interference with union activities based on political considerations will not be unknown and selective enforcement of the statute in order to obtain control of a union, limit a political opponent, or destroy an effective organization will become a distinct possibility. This Court must act now to limit the sweeping interpretation the plaintiff seeks to impose on this statute. The order appointing a receiver over a party in interest must be reversed.

POINT II

THE COURT BELOW LACKED JURISDICTION
TO APPOINT A RECEIVER IN THE ABSENCE
OF THE PLANS AND THE BENEFICIARIES
AS PARTIES

Appellee argues that the jurisdictional claims raised by appellants "would impose an unnecessary procedural hurdle, not contemplated by or warranted in the statutory scheme of remedies." (Appellee's Brief, p. 40). However, appellee's argument is of little weight since the statutory scheme cannot override the requirements of due process of law under the Constitution. Thus, appellee's argument totally ignores the requirements of Mullane v. Central Hanover Tr. Co., 399 U.S. 306 (1949) that the beneficiaries of a trust must at least be given notice if their rights are affected by the litigation. As appellee correctly notes, the beneficiaries of the instant plans will be affected by this litigation. (Appellee's Brief, p. 39) Since the beneficiaries are admittedly affected by the litigation and their property rights affected, "notice and hearing must measure up to the standards of due process." Mullane, supra, 399 U.S. at 313.

While notifying the beneficiaries may present a "procedural hurdle", in the words of appellee, it does not defeat the statutory scheme or preclude litigation of this type. Notice simply works to insure that all interested and affected parties are represented

in the action.

Appellee also argues that even though the plans themselves are affected by the litigation, they need not be joined as parties since in personam jurisdiction exists against the trustees. While it may be correctly said that in personam jurisdiction exists, such jurisdiction does not permit the remedy utilized by the Court below. In personam jurisdiction is limited, as appellee's citation of the Restatement of the Law of Trusts clearly demonstrates, (Appellee's Brief, p. 40), to remedies against the trustee such as personal liability, injunction, or ultimate removal. Restatement of the Law of Trusts-Second, §199, as cited by Appellee (p. 40). In personam jurisdiction over the trustees* does not permit a receivership over an entity not a party to the litigation. Cf. O'Brien v. Cassidy, 76 Cr. 1076 (E.D.N.Y., July 7, 1976).** In the absence of the plans as defendants, the relief must be shaped to the parties before the Court. Ward v. Deavers, 203 F. 2d 73 (D.C. Cir. 1953). Such relief does not include a receivership.

* Interestingly, the plaintiff did not specifically designate in the complaint that the trustee defendants were sued in their capacities as trustees or as individuals. Such designation was made by this plaintiff's predecessor in Usery v. Penn, 426 F. Supp. 830 (W.D. Okla., 1976) in which the plaintiff was represented by the same counsel as in the instant litigation.

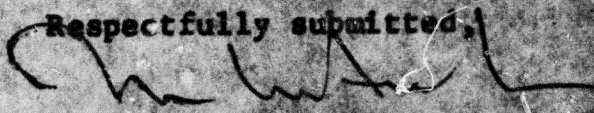
** O'Brien v. Cassidy, is discussed in Appellant's Brief at page 42.

CONCLUSION

For the reasons above set forth, Appellants respectfully request that the orders entered below be reversed and that a stay of said orders be entered pending the conclusion of this appeal.

Dated: July 8, 1977

Respectfully submitted,



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CERTIFICATE OF SERVICE

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Two copies of the Reply Brief of Appellants General Teamsters
Industrial Employees Local 806 and 806 Record Processors, Inc.

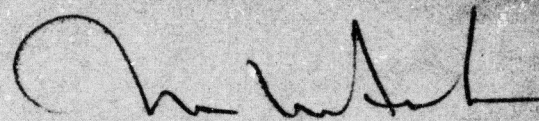
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Dated: July 8, 1977
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